STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID C. PAGE,

Defendant-Appellant.

UNPUBLISHED
August 6, 1999

No. 206437
Oakland Circuit Court
LC No. 97-151942 FH

Before: Zahra, P.J., and Saad and Collins, JJ.

PER CURIAM.

The jury convicted defendant of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and the court sentenced defendant to four to twenty years' imprisonment. Defendant now appeals his conviction and sentence as of right. We affirm.

Defendant first argues that the prosecutor failed to present sufficient evidence to support defendant's conviction. We disagree. When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified on other grounds 441 Mich 1201 (1992).

"The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or offer with force or violence to do corporal hurt to another, (2) coupled with an intent to do great bodily harm less than murder." *People v Pena*, 224 Mich App 650, 659; 569 NW2d 871 (1997), mod on other grounds 457 Mich 885 (1998). In *Pena*, this Court held that there was an inference that the defendant acted with intent to inflict great bodily harm when overwhelming evidence indicated that the defendant, along with others, beat and kicked the victim in the face, head, arms and chest. *Id.* at 659-660. The emergency physician in that case testified that kicks to the head could cause serious injury. *Id.*

The facts in this case are similar to those set forth in *Pena, supra*. Chiara and Sebastian testified that they observed defendant, along with others, kicking the victim in the back, side, ribs and

stomach in a forceful manner. The treating physician testified that the victim sustained swelling of the face and side, abrasions and bruised kidneys as a result of the kicking. The doctor further testified that the victim's injuries were potentially life-threatening. Viewing the evidence in the light most favorable to the prosecution, we find that there was sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that defendant committed an assault with intent to do great bodily harm less than murder. *Wolfe, supra*.

Defendant next contends that the prosecutor engaged in prosecutorial misconduct by injecting race into the trial during closing argument. We disagree. The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). A determination of whether prosecutorial comments are improper depends upon a reading of the comments in context. *People v Anderson*, 166 Mich App 455, 471;421 NW2d 200 (1988).

During closing arguments, the prosecutor stated:

> Now this is the part that's interesting. And I think maybe, hopefully one of you caught this. When Mike Noelke was testifying, and I asked him, "Well, what were people saying?" and he said, "Somebody said 'Kick that white boy's ass.'" And maybe one of you saw the defendant go like this (indicating). Okay? Maybe one of you did. But I'll submit this: If the defendant was far away, as his friend wants you to believe, how in the world would he know what was said, and why would he care, if he didn't have anything to do with it? Why would he have done that? He certainly thinks that wasn't said for a reason. . . .

Examining the prosecutor's comments in the context in which they were made reveals that the comments were not made for the purpose of emphasizing race. Rather, the prosecutor was referring to defendant's reaction to the victim's testimony while advancing the argument that if defendant had, in fact, been standing far away from the attack, then he would have had no basis upon which to contest the victim's testimony because defendant would not have been close enough to hear what was said during the attack. The prosecutor's statement, viewed in context, did not deny defendant a fair and impartial trial. Therefore, we find that there was no prosecutorial misconduct.

Defendant further asserts that the trial court committed reversible error while instructing the jury. We disagree. We review de novo claims of instructional error. *People v Bartlett*, 231 Mich App 139, 143; 583 NW2d 341 (1998). This Court reviews jury instructions as a whole to determine whether there is error requiring reversal. *Id*. The instructions must include all the elements of the charged offense and must not omit material issues, defenses, and theories if the evidence supports them. *Id*.

Defendant first alleges that the jury instructions for felonious assault were improper because the jury was permitted to consider that a foot inside a shoe, in all cases, was a dangerous weapon that could result in a great bodily harm-type assault. However, the trial court specifically instructed the jury

that a foot inside a shoe is only a dangerous weapon if the jury decides that it was used in a way to cause serious physical injury or death. The trial court did not, as defendant represents, instruct the jury to consider that a foot inside a shoe was a dangerous weapon in all cases. Moreover, the instructions given were consistent with standard criminal jury instructions 17.8, 17.9 and 17.10. Additionally, case law supports the proposition that any object can be considered a dangerous weapon if it is used in a dangerous manner. *People v Buford*, 69 Mich App 27, 30; 244 NW2d 351 (1976). Accordingly, we find that the trial court did not err in giving the jury instructions for felonious assault.

Defendant also claims that the trial court committed reversible error by improperly stating the incorrect burden of proof. We disagree. While instructing the jury, the trial court stated:

> You should not decide this case based on which side presented more witnesses. Instead, you should think about each witness and each piece of evidence and whether you believed it. Then you must decide whether the testimony and evidence you believe proves beyond a reasonable doubt that the defendant is **not** guilty. (Emphasis added.)

The trial court incorrectly inserted the word "not" in the last sentence. Although the burden stated above is incorrect, the trial court correctly stated that the prosecution had to prove all the elements of the crime beyond a reasonable doubt on at least five other occasions. In fact, in the initial instructions, the trial court stated, "The prosecution must prove each element of the crime beyond a reasonable doubt. Now, the defendant is not required to prove his innocence or do anything."

In *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1995), this Court stated that if both a correct and an incorrect instruction are given, this Court will presume that the jury followed the incorrect charge. *Id*. However, in *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996), this Court stated that even if the jury instructions are somewhat imperfect, it does not create error if the instructions fairly presented the issue to be tried and sufficiently protected the defendant's rights. Because the correct instruction on the prosecution's burden of proof was given at least five other times, we find that the jury instructions fairly presented the issues to be tried and protected defendant's rights. Therefore, we find no reversible error was committed by the trial court in instructing the jury.

Finally, defendant argues that his sentence was not proportionate to the seriousness of the crime. We disagree. We review a trial court's imposition of sentence for an abuse of discretion. *People v Houston*, 448 Mich 312, 319; 532 NW2d 508 (1995). A trial court abuses its discretion when it violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). This principle is violated when the sentence is not proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id*.

Defendant was sentenced to four to twenty years as a fourth habitual offender. Defendant claims that the sentence was not proportionate to the crime because defendant was not a leader in the attack. Defendant also claims that there was insufficient evidence to convict him and that he has strong family support, has completed his GED and maintained employment.

Here, two eyewitnesses testified that defendant took part in the attack on the victim which caused potentially life-threatening injuries. The eyewitnesses observed defendant, along with others, kicking the victim in the back, side, ribs and stomach in a forceful manner. Additionally, the victim's treating physician testified that the victim suffered from swelling in the face and side, abrasions and bruised kidneys due to the kicks the victim received during the attack.

Moreover, at the time of this offense, defendant was on probation for unlawfully driving away an automobile and for receiving and concealing stolen property. After a one year sentence in the Oakland County Jail, defendant was released on July 12, 1996. Defendant was already in violation of his probation for failure to report and failure to pay court ordered fees. He has also had a misdemeanor conviction for driving while impaired. Given the seriousness of the crime and defendant's background, we find that defendant's four-year minimum sentence was proportionate to the circumstances surrounding the seriousness of the offense and the offender. *Milbourn, supra* at 635-636.

Affirmed.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Jeffrey G. Collins